LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
OCT 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447

EX PARTE JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, AND PETER S. PEDERSEN, CO-PARTNERS, DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY.

REPLY BRIEF FOR PETITIONER.

LLOYD C. ROOT,
DANIEL V. O'KEEFFE,
MARZALL, JOHNSTON, COOK & ROOT,
135 South La Salle Street,
Chicago 3, Illinois,

JOHN O'C. FITZGERALD,
10 South La Salle Street,
Chicago, Illinois,

SPENCER CARVER,
BIGGER, BAKER, LLOYD & CARVER,
2020 Republic Bank Building,
Dallas, Texas,
Attorneys for Plaintiff-Petitioner.

INDEX.

PAGE

I. The Present Case Meets the Important Prerequisites for Review by This Court—Respondents Advance No Valid Reason for Denial of the Petition 1

A. Respondents Seek to Induce This Court to Ignore the Basic Issues Involved in This Case and the Fundamental Reasons for Granting the Petition 1

B. There Is Widespread Conflict in the Lower Federal Courts Concerning the Issue Involved 3

II. The Question Presented Is Accurately Stated in the Petition 4

III. The Decision of the Court Below Is in Conflict with the Decisions of This Court Cited in the Petition for Certiorari 5

IV. The Decision of the Court Below Is in Conflict with the Decision of the Court of Appeals for the Ninth Circuit in the Case of Shapiro v. Bonanza Hotel Co., 185 F. 2d 777 7

Conclusion 7

AUTHORITIES CITED

Ex parte Collett, 337 U. S. 55, footnote "29", p. 69; 83 ..... 4, 5, 6

Felchlin v. American Smelting and Refining Company, 136 F. Supp. 577 (D. S. S. D. Calif., N. D.—1955)... 2

Fource Glass Co. v. Transmirra Products Corp., 353 U. S. 222 (April 29, 1957)..... 6

General Electric Company v. Central Transit Warehouse Company, et al. (W. D. Mo. W. D.—1955), 127 F. Supp. 817, 827..... 2

Gulf Oil Corp. v. Gilbert, 330 U. S. 501..... 5

Pope v. Atlantic Coast Line Railroad Company, 345 U. S. 379..... 5, 6

Moore's Federal Practice, 2d ed., Vol. 3, page 2141.... 4

Shapiro v. Bonanza Hotel Co. (C. C. A. 9), 185 F. 2d 777..... 7

U. S. C. A., Title 28, Sec. 1404(a)..... 3, 4, 5, 6, 7

U. S. C. A., Title 28, Sec. 1400(b)..... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447.

EX PARTE JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, AND PETER S. PEDERSEN, CO-PARTNERS, DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY.

REPLY BRIEF FOR PETITIONER.

I.

THE PRESENT CASE MEETS THE IMPORTANT PREREQUISITES FOR REVIEW BY THIS COURT—RESPONDENTS ADVANCE NO VALID REASON FOR DENIAL OF THE PETITION.

A. Respondents Seek to Induce This Court to Ignore the Basic Issues Involved in This Case and the Fundamental Reasons for Granting the Petition.

In their brief, Respondents seek to have this Court ignore the fact that Petitioners filed the present patent suit in a District Court which had original jurisdiction, and that, over the objection of the Petitioners, the District Court ordered transfer of the suit to a District which would not have had original jurisdiction. Petitioners contend that the District Court did not have the *power* to order such a transfer.

This is not a case wherein a plaintiff has brought an action in a District wherein the Court did not have proper original jurisdiction, and the defendant entered a general appearance and waived its objection to venue. It is a case wherein the plaintiff brought the action in a District wherein venue was proper and the District Court, over the objection of the plaintiff, *transferred* the case to a District wherein venue was not proper.

As was said by Judge Whittaker in the case of *General Electric Company* v. *Central Transit Warehouse Company, et al.* (W. D. Mo. W. D., 1955), 127 F. Supp. 817, 827:

> "We adhere to our original conclusion that a district court is *without power** to transfer a cause, under Section 1404(a), Title 28, U. S. C. A., *to a district without statutory venue* and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

Also, as was stated by Judge Jertberg in the case of *Felchlin* v. *American Smelting and Refining Company*, 136 F. Supp. 577 (D. S. S. D. Calif., N. D., 1955):

> "*A District Court is a separate entity. No District Court has jurisdiction crossing a state line.* By virtue of these limitations, the transfer of any cause from one district to another is a question of *power. No District Court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent.*"
>
> . . . . . .
>
> "Statutory authority to transfer an action to a district or division *'where it might have been brought'* certainly does not authorize transfer to a district where the action might *not* have been brought.' *Gen-*

* Emphasis added throughout, unless otherwise indicated.

era Electric Co. v. *Central Transit Warehouse Co.*, 127 F. Supp. 817. The phrase 'might have been brought' means the place where the plaintiff had the *right* to *institute* the suit originally. *Grève* v. *Gibraltar Enterprises*, D. C. N. M. 85 F. Supp. 410, 412."

The practical significance of the issue involved far transcends the present case, as is compellingly illustrated by the widespread conflict in the lower Federal Courts, which conflict is specifically admitted by the Court of Appeals below (Appendix to Petition for Certiorari, p. 3a). In the interests of uniform and orderly procedure in patent litigation, this Court should grant certiorari to resolve the confusion arising from the application by the lower Federal Courts of squarely conflicting interpretations of Section 1404(a), Title 28 U. S. C. A.

B. There is Widespread Conflict in the Lower Federal Courts Concerning the Issue Involved.

The petition demonstrates that widespread, direct and irreconcilable conflict exists in the lower Federal Courts concerning the proper interpretation of Section 1404(a), Title 28 U. S. C. A. The existence of this conflict is specifically admitted by the Court of Appeals, below, in its opinion (Appendix to Petition for Certiorari, p. 3a).

The brief of Respondents (p. 2, Para. 3) points up rather than negatives this widespread conflict on an important basic question, which should be settled once and for all.

II.

THE QUESTION PRESENTED IS ACCURATELY STATED IN THE PETITION.

It is self-evident that the question presented is accurately stated in the petition.

The Respondents' attempt in their alleged restatement of the question (Respondents' Brief, p. 3), to treat the issue involved herein as though it were the same thing as if the plaintiff had originally filed the suit in a District wherein venue could not be had, and the defendant had filed a general appearance and waived venue, is without merit.

This is a case involving a *transfer* of an action from one District to another under Section 1404(a), Ttle 28 U. S. C. A., which is the only statutory grant of power by which a District Court may transfer a case of this type to another District. This Court itself, in the case of *Ex parte Collett*, 337 U. S. 55, in footnote "29", on page 69, adopted the language of 3 Moore's Federal Practice 2141 2d ed., which stated that this section

> "provides for a transfer * * * of any action to a *proper* and more convenient forum."

Contrary to the Respondents' contentions, this does *not* mean that this section of the Statute provides for a transfer of an action to an *improper* forum.

III.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT CITED IN THE PETITION FOR CERTIORARI.

The attempt of the Respondents (pp. 2, 4 and 5) to minimize the conflict between the decision of the Court below with the decisions of this Court is in error.

Contrary to the Respondents' contentions, this Court in the case of *Ex parte Collett*, 337 U. S. 55, specifically stated that Section 1404(a), Title 28 U. S. C. A., "was drafted *in accordance with the doctrine of forum non conveniens.*" The doctrine of *forum non conveniens presupposed* "*at least two* forums in which the defendant is amenable to process," *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501. The Court below has held that this section is not so limited and, therefore, is in direct conflict with the opinion of this Court in the case of *Ex parte Collett*.

Also, contrary to Respondents' contention, the decision of the court below is in direct conflict with the opinion of this Court in the case of *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379, wherein this Court cited with approval the aforementioned case of *Ex parte Collett* and, at page 83, stated as follows with respect to Section 1404(a):

> "• • • its *limited purpose* is to authorize, under certain circumstances, the transfer of a civil action from one federal forum to another federal forum in which the action '*might have been brought*'."

It will be remembered that in the case of *Ex parte Collett*, this Court stated that Section 1404(a) provides for a transfer to a *proper* forum. Hence, it is apparent that when, in the case of *Pope* v. *Atlantic Coast Line Railroad Company*, this Court spoke of a "forum in which the ac-

tion "'might have been brought'," it was speaking of a *proper* forum and *not* an improper forum. The court below, in its opinion, has interpreted Section 1404(a) as permitting transfer to an improper forum and hence, is in direct conflict with the opinion of this Court in the *Pope* v. *Atlantic Coast Line Railroad Company* case.

In addition, Respondents' attempt (Respondents' Brief, p. 5) to minimize the holding of this Court in the case of *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222 (April 29, 1957), and the Respondents' statement that the case "*merely* held that a patent infringement suit was properly dismissed for lack of venue upon defendant's motion" is in error. That case also *held*, that Section 1400(b) is the sole and exclusive statutory provision controlling venue in patent infringement actions, this Court specifically stating in its opinion at page 789 as follows:

> "We *hold* that 28 U. S. C. A. Sec. 1400(b) is the *sole and exclusive* provision controlling venue in patent infringement actions. * * *"

Section 1400(b) sets forth the requirements for the District in which a patent infringement action "*may be brought.*" The Northern District of Illinois does not meet those requirements in the present action and hence is not a "*proper*" forum within the meaning of this Court's opinion in the aforementioned *Ex parte Collett* case. The court below has held, in effect, that the "*may be brought*" language of Section 1400(b) is meaningless and, therefore, its opinion is in direct conflict with the opinion of this Court in the *Fourco Glass Co.* case wherein the court specifically held that Section 1400(b) is the *sole exclusive* provision *controlling* venue in patent infringement actions.

IV.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF SHAPIRO v. BONANZA HOTEL CO., 185 F. 2d 777.

Respondents' attempt (Respondents' Brief, p. 7) to induce this Court to believe that petitioners have misconstrued the holding of the Court of Appeals for the Ninth Circuit in *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, is in error.

In the *Shapiro* case, the Court of Appeals for the Ninth Circuit was ruling on the meaning of Section 1404(a), Title 28 U. S. C. A., and *held* that Congress, by using the word "brought" in Section 1404(a), had not meant to change the rule, as previously laid down by the doctrine of *forum non conveniens*, that the right to transfer presupposes at least two forums in which the defendant is amenable to process, and *held* that under Section 1404(a), in order to transfer a case from one District to another, the case must have been able to have been originally *properly* brought in the transferee district. The Court of Appeals below has held that Section 1404(a) is not so limited and, therefore, is in direct conflict with the Court of Appeals for the Ninth Circuit in the *Shapiro* case.

CONCLUSION.

It is submitted that the petition for certiorari clearly presents an important question of statute interpretation on which there is admitted, widespread conflict in the lower Federal Courts. Also, the Court of Appeals below handed down a decision which is in conflict with applicable decisions of this Court, and with a decision of the Court of Appeals for the Ninth Circuit, and which is admittedly in conflict with the decisions of District Courts in six other

circuits. The petition for writ of certiorari should be granted in the interests of uniform and orderly procedure in patent litigation and in the interests of resolving, once and for all, the confusion arising from the application by lower Federal Courts of squarely conflicting interpretations of Section 1404(a), Title 28 U. S. C. A.

Respectfully submitted,

LLOYD C. ROOT,
DANIEL V. O'KEEFFE,
MARZALL, JOHNSTON, COOK & ROOT,
135 South La Salle Street,
Chicago 3, Illinois,

JOHN O'C. FITZGERALD,
10 South La Salle Street,
Chicago 3, Illinois,

SPENCER CARVER,
BIGGER, BAKER, LLOYD & CARVER,
2020 Republic Bank Building,
Dallas, Texas,
Attorneys for Petitioner.